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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KENNETH RAY BISHOP, JR., Defendant and Appellant.	F064283 (Kern Super. Ct. No. BF136472A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Michael B. Lewis, Judge.

Robert F. Kane, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Cornell, J. and Kane, J.

INTRODUCTION

Appellant Kenneth Ray Bishop, Jr., appeals from a judgment of conviction upon a plea of nolo contendere of transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)) with a prior felony conviction (Pen. Code, § 667, subd. (e)), and two prior convictions within the meaning of Health and Safety Code section 11370.2, subdivision (a). We will correct the abstract of judgment and affirm.

STATEMENT OF THE CASE

On November 18, 2011, appellant entered into a plea agreement with the Kern County District Attorney. Appellant pleaded nolo contendere as set forth above in exchange for a stipulated maximum 14-year state prison sentence and dismissal of other substantive charges and special allegations.

On January 6, 2012, the trial court denied appellant probation and sentenced him to the stipulated term of 14 years in state prison. The court imposed a term of eight years (the doubled upper term of four years) for the prior felony conviction (Pen. Code, § 667, subd. (e)), and two three-year enhancements for the priors charged under Health and Safety Code section 11370.2, subdivision (a)). The court awarded 397 days of custody credits and directed the 14-year term to be served concurrently with appellant's five year sentence in three other pending cases.

On January 18, 2012, appellant filed a timely notice of appeal challenging the validity of the plea and a request for certificate of probable cause (Pen. Code, § 1237.5, subd. (b)). On January 20, 2012, the superior court granted the request for certificate of probable cause.

STATEMENT OF FACTS[1]

Testimony of Officer Vaugahan

At the November 9, 2011 hearing on a motion to suppress, Bakersfield Police Officer Ryan Vaugahan testified that he and Officer Matthew Tramel were traveling in a marked patrol car on the evening of April 17, 2011. Officer Vaugahan said he and Officer Tramel were driving eastbound in the 1700 block of Fairview Road when they saw a 1985 Chevrolet fail to come to a complete stop behind the limit line at the intersection of Fairview Road and South H Street. As the Chevrolet proceeded through the intersection, Vaugahan activated the overhead red and blue emergency lights of the patrol vehicle. The Chevrolet did not respond to the emergency lights and continued eastbound at 10 miles per hour. Vaugahan then activated the forward emergency lights, center spotlight, and siren of the patrol car. Tramel also activated a spotlight on his side of the patrol car.

Upon activation of the siren, Vaugahan noticed movement by the occupants of the Chevrolet. Vaugahan said the illumination by the patrol car lights revealed that the male driver reached under the seat and then handed something to the female passenger. Vaugahan also stated that the female passenger threw her hands into the air and moved her body away from the driver. After the passenger completed her movements, the driver leaned forward as if he were placing something under the seat. The Chevrolet pulled over after the patrol car followed it for two blocks. Vaugahan approached the Chevrolet on the driver's side and Tramel approached on the passenger's side. Appellant was seated in the driver's seat and his wife, Sasha, was seated in the passenger seat.

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1 Because this appeal is taken from a judgment on a plea of nolo contendere, the facts are taken from the reporter's transcripts of the September 26, 2011 preliminary hearing and the November 9, 2011 hearing on appellant's motion to suppress evidence (Pen. Code, § 1538.5).

Vaugahan said appellant's left hand was concealed when he first approached the car; that appellant appeared to be very nervous because his hands were shaking; and he avoided eye contact. Vaugahan asked appellant to place his hands on the steering wheel. Appellant initially complied but then dropped his left hand down to the area of his waistline. Tramel shined a flashlight into the interior of the Chevrolet and reported that a firearm was located under the driver's seat. Vaugahan removed appellant from the Chevrolet, arrested him, and placed him into custody without any incident.

After placing appellant under arrest, an officer conducted a pat down search and found a glass smoking pipe in the outer ankle area of appellant's left sock. The pipe contained a white crystalline substance that appeared to Vaugahan to be methamphetamine. The same officer retrieved the firearm from under the seat and determined that it was loaded. The weapon was a black .22-caliber long rifle automatic handgun with cream colored hand grips. Officers also found a police baton on the rear seat of the Chevrolet.

Testimony of Officer Tramel

Tramel testified that he personally witnessed appellant's failure to stop at the limit line at Fairview and H on the evening of April 17, 2011. After the Chevrolet finally yielded, Tramel approached the passenger's side of the vehicle and looked into the interior while both occupants were still seated. Tramel said he looked through the upper left-hand corner of the front windshield and saw a dark colored pistol on the floorboard just underneath the driver's seat. He informed Vaugahan of his discovery.

DISCUSSION

Bishop's appellate counsel has filed a brief which summarizes the facts, with citations to the record, raises no issues, and asks this court to independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) Appellant responded to this court's invitation to submit additional briefing by filing a letter brief on August 30, 2012.

A. Appellant's Specific Contentions

Appellant contends his trial counsel's conduct fell below professional norms, causing him prejudice. Appellant specifically contends his trial counsel was ineffective by failing to (1) advise at the time of change of plea that appellant would be subject to more than five years of imprisonment; (2) advise appellant that he would be ineligible for 50 percent conduct credits; (3) assist appellant in filing timely notices of appeal in companion case Nos. BF134904B, BF136051A, and BF135997A; (4) obtain a more compassionate sentence, such as some type of drug rehabilitation program; and (5) provide appellant with police reports, transcripts, and drug analyses. Appellant also contends a change in counsel on June 28, 2011–from defense attorney Roger Lampkin to defense attorney Brian McNamara–resulted in the irreparable breakdown of the attorney-client relationship.

B. Governing Case Law

To prevail on an ineffective assistance of counsel claim, appellant must demonstrate that trial counsel's performance fell below the standard of reasonableness and that there is a reasonable probability the result would have been more favorable had his counsel provided adequate representation. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Bolin* (1998) 18 Cal.4th 297, 333.) Appellant must also show that the omission was not the result of a reasonable tactical decision. (*People v. Gurule* (2002) 28 Cal.4th 557, 611.) However, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.… If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland v. Washington, supra,* at p. 697.)

An appellate court's ability to determine from the record whether an attorney has provided constitutionally deficient legal representation is in the usual case severely hampered by the absence of an explanation of an attorney's strategy. Thus, "[i]f the

record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-268[].)" (*People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069; *People v. Weaver* (2001) 26 Cal.4th 876,

C. Analysis

1. Sentencing Consequences

On this record, we cannot say that appellant's claim of ineffectiveness prevails. As to the sentencing consequences, appellant's trial counsel stated at the November 18, 2011 change of plea hearing: "He's [appellant's] already been sentenced on a five-year commitment as to the three cases BF134904B, BF135997A, and BF136051A, and the five years is to run concurrent with the 14-year stipulated." The court specifically asked appellant whether that was his understanding of the offer and appellant responded, "Yes, Your Honor." Thus, appellant's claim that he was unaware of the 14-year sentence is not supported by the record. This is particularly true where appellant signed and initialed a "Felony Advisement of Rights, Waiver and Plea Form" that set forth the 14-year stipulated term.[2]

[2] Appellant also contends "The paper I signed on March 27, 2011 was for 'four years'–for Case #BF134904 and 'one year'–for both Case #BF136051 [and] BF#135997. It was for "possess"–H & S 11377(a) not 'transport.' 'Possess' was the original charge filed. Sometime after the plea it was changed! Which was why I had informed 'Mr. Lampkin' that I'd like to 'withdraw' my plea on those cases. He told me that I could not withdraw my plea and instead filed a motion to see if I'm competent.… Now remind you 'Mr. Lampkin' is questioning my competen[ce] after we signed a 'plea agreement.' " The record in the instant appeal sheds no light on whether or why counsel acted or failed to act in the manner challenged in the companion cases. These claims of ineffectiveness must be rejected. (*People v. Mendoza Tello, supra,* 15 Cal.4th at p. 266.)

2. Award of Credits

As to the award of credits, we acknowledge that "before taking a guilty plea the trial court must admonish the defendant of … the direct consequences of the plea." (*People v. Walker* (1991) 54 Cal.3d 1013, 1022.) Assuming without deciding that the award of reduced credits constitutes a direct consequence of appellant's plea, any error in failing to advise a defendant of such a consequence "is waived absent timely objection." (*Id*. at p. 1023.)

3. Filing of Notices of Appeal in Companion Cases

With respect to the alleged failure to file timely notices of appeal in the companion cases, the U.S. Supreme Court has held: "[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." (*Roe v. Flores-Ortega* (2000) 528 U.S. 470, 477.) In his supplemental letter brief, appellant contends "in the previous cases–(BF134904B, BF136051A, BF135997A) my appeal rights lapsed due to counsel's failure to advise me of my appeal rights and/or file a 'notice of appeal' on my behalf." The burden of proving ineffective assistance of counsel is on appellant. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) The instant record offers no insight into the handling of potential appeals in the companion cases. To the extent a claim of ineffectiveness might be predicated on matters outside the record on appeal, we are unable to assess it in this proceeding. (See *People v. Pope, supra,* 23 Cal.3d at p. 426.)

4. Failure to Obtain a More Compassionate Sentence

As to counsel's alleged failure to obtain a more compassionate sentence, we note that appellant's trial counsel filed a statement regarding sentencing on December 27, 2011. That statement incorporated by reference appellant's handwritten letter dated December 20, 2011, setting forth his personal history. The letter described appellant's longstanding addiction to drugs, indicated that he had "never been given the opportunity for any 'drug rehabilitation program or treatment,' " and requested such a program in lieu

of imprisonment. The statement regarding sentencing also incorporated by reference a letter from appellant's parents, which stated: "We are pleading for some drug rehab program for him while he is in prison. Please give him that opportunity. He has never been in a program during all the years of abuse." The probation officer reported: "The defendant stated he would have made better choices if he was not on drugs. He stated he wanted some help in the form of treatment and he had never had a chance at rehabilitation." The court read and considered the probation officer's report. Appellant's claim that counsel made no attempt to secure a more compassionate sentence is belied by the record.

5. Failure to Provide Reports, Transcripts, and Analyses

Appellant contends: "To this day I have still never read or seen any of the 'police reports,' 'transcripts,' 'drug analys[e]s.' Counsel fail[ed] to provide me with any of them. The same with my first attorney 'Mr. Roger Lampkin,' who said he does not give his cli[e]nts any of the reports. This is one reason I've been unable to provide any transcripts to show that counsel was 'ineffective.' "

The Supreme Court has stated: "We have repeatedly stressed 'that "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] … unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' (*People v. Wilson* (1992) 3 Cal.4th 926, 936 ….)" (*People v. Mendoza Tello*, *supra*, 15 Cal.4th at p. 266.)

The record in the instant appeal sheds no light on whether or why counsel acted or failed to act in the manner challenged. Under the rule of *Mendoza Tello, supra*, 15 Cal.4th 264, the claim of ineffectiveness must be rejected.

6. Breakdown of Attorney-Client Relationship

Appellant lastly contends a change in counsel on June 28, 2011–from defense attorney Roger Lampkin to defense attorney Brian McNamara–resulted in the irreparable

breakdown of the attorney-client relationship. Once again, the record in the instant appeal sheds no light on whether or why counsel acted or failed to act in the manner challenged. Under the rule of *Mendoza Tello*, *supra*, 15 Cal.4th 264, the claim of ineffectiveness must be rejected.

D. Other Issues

Appellate counsel correctly notes: "As appellant was convicted of a violation of Health and Safety Code section 11379, the enhancement should be pursuant to Health and Safety Code section 11370.2, subdivision (c), rather than Health and Safety Code section 11370.2, subdivision (a) as set forth in the abstract of judgment." We agree and direct the superior court to amend the abstract accordingly and to transmit certified copies of the amended abstract to all appropriate parties and entities.

Following independent review of the record, we find that no other reasonably arguable factual or legal issues exist.

DISPOSITION

The judgment is affirmed. The superior court is directed to amend the abstract of judgment to reflect a three-year enhancement pursuant to Health and Safety Code section 11370.2, subdivision (c) rather than Health and Safety Code section 11370.2, subdivision (a). The superior court is further directed to transmit certified copies of the amended abstract to all appropriate parties and entities.